

DATE: December 6, 1997
CASE NO. 95-INA-433

In the Matter of:

COMMUNITY WOMEN'S EDUCATION PROJECT
Employer

On Behalf of:

ANDREA ANNEMARIE BRETTING
Alien

APPEARANCE: Ann A. Ruben, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On December 14, 1993, the Employer, Community Women's Education Project, filed an application for labor certification to enable the Alien, Andrea Annemarie Bretting, to fill the position of "Training Advocate," which the local Job Service classified as "Social Group Worker." The job duties for the position, as stated on the application, are as follows:

1. Provide case management, including academic, vocational and personal counseling; career assessment; and life skills instruction to more than 200 adult students participating in basic education, job readiness and/or college preparation programs sponsored by the agency.
2. Facilitate weekly support groups for students and conduct regular workshops on issues of personal and professional growth. Provide family intervention counselling re. parenting issues.
3. Monitor student progress. Maintain student records and statistical reports.
4. Serve as liaison to agency's primary funding source, the Private Industry Council (PIC). Ensure compliance with all PIC contract requirements for recruitment, intake, tracking, placement and follow-up as well as related recordkeeping. Represent agency at regular PIC meetings and in efforts to resolve any operational or policy issues which arise.
5. Research and maintain current information on job training and other educational, vocational, psychosocial resources.
6. Provide students' feedback to agency's instructors and other staff.
7. Prepare correspondence, memoranda and reports.

(AF 96,98).

The stated job requirements for the position, as set forth on the application, are as follows: 4 years of college education with a B.A. or equivalent degree in Social Work or Education Counselling; and, 3 years of experience in the job offered or in the Relation Occupation of "Case manager or counselor for adults." In addition, the following Other Special Requirements are listed:

Previous experience providing case management or counseling services must be directly relevant to Training Advocate duties i.e. 1) must have done both individual and group counseling; 2) must have strong assessment skills; 3) must have experience with community outreach, generating resources and obtaining relevant supportive services; 4) must have experience working effectively with multicultural, diverse client population, particularly those whose education and/or work history has been disrupted because of poverty, substance abuse, mental health problems, domestic violence, sexual abuse or single parent status; 5) must

have experience with family intervention counseling methods; 6) must be computer literate; 7) must have experience with higher education institutions, vocational schools and student financial aid sources; 8) must have experience working in organization utilizing participatory management style.

(AF 96,98).

In a Notice of Findings ("NOF") issued on November 14, 1994, the CO proposed to deny certification on the grounds, *inter alia*, that the wage offer of \$22,477 per year is below the prevailing wage of \$27,478 per year, as determined by the Pennsylvania Department of Labor & Industry, Bureau of Research & Statistics, Occupational Wages 1993 - Caseworker (AF 61-64).¹

After the Employer filed multiple requests for extensions of the rebuttal period (AF 55,56,57,60), the Employer submitted its rebuttal on or about February 21, 1995 (AF 37-54). As set forth in the Final Determination, dated March 16, 1995, the CO found that the Employer had failed to show that the State prevailing wage rate determination is erroneous; and, even assuming that the State's survey has shortcomings, the Employer has not sustained its burden of establishing that its wage offer equals or exceeds the prevailing wage, because its survey is flawed (AF 13-16).

On April 20, 1995, the Employer filed a request for review of the denial of certification (AF 1-12). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

Under 20 C.F.R. §656.20(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage determined under section 656.40. Section 656.40(a)(2) provides that, where, as here, the occupation is not subject to the Davis-Bacon Act or the Service Contract Act, the prevailing wage for the occupation is determined by the average wage paid to workers similarly employed in the area of intended employment.

Where the employer is notified that its job offer is below the prevailing wage rate, but fails to either raise the wage to the prevailing wage or justify the lower wage it is offering, certification is properly denied. Editions Ereboundi, 90-INA-283 (Dec. 20, 1991); Trilectron Industries, Inc., 90-INA-188 (Dec. 19, 1991).

In its rebuttal, dated February 21, 1995, Employer's counsel stated, in pertinent part:

¹Inexplicably, two pages of the Notice of Findings (AF 62-63) are not contained in the Appeal File. Nevertheless, it is clear from the rest of the Notice of Findings (AF 61,64), the Employer's response thereto (AF 17-59), the Final Determination (AF 13-16), and the Memorandum in support of Employer's appeal (AF 2), that the prevailing wage issue is the crux of this case.

As I believe that you (CO) already agreed that the methodology for the state survey is seriously flawed based on the information and arguments originally submitted to you by my co-counsel, Janet Parrish, we would request that the instant survey be substituted for the state survey for the position at issue here. Please note that the survey clearly covers all sectors including government, non profit and for profit organizations.

(AF 37). Accordingly, the Employer's rebuttal includes a survey of various employers involving 3,414 caseworkers, whose average annual salary is \$23,481 (AF 38-40,43-54). Since the wage offer of \$22,477 is within 5% of the average rate of wages as found on the Employer's survey (i.e., \$23,481), the Employer contends that it complied with the applicable regulations. 20 C.F.R. §656.20 and §656.40.

In the Final Determination, the CO found the rebuttal unacceptable, stating, in pertinent part:

First, you have not shown that the State survey is erroneous. There is no evidence in the case file which in any way corroborates your statement of February 21, 1995, that this office had "already agreed that the methodology of the state survey is seriously flawed." You have not demonstrated that the state survey is seriously flawed.

Next, the arguments presented in attorney Janet Parrish's letter of December 20, 1993, to the Pennsylvania Job Service, made a series of assumptions attempting to show that the State survey is flawed. Yet none of these presumptions is supported by factual evidence. For example, there is no evidence that (1) the State survey is not representational of various employer organizations (2) the State used a "weighted average" and (3) the wages reported included supervisors' wages.

Second, even assuming that the State's survey has shortcomings, you have not sustained your burden with regard to the second prong of the Notice, i.e., that the employer's wage offer equals or exceeds the prevailing wage. While you appear to have addressed our objection that your survey was not sufficiently "representational," your survey is nevertheless flawed for the following reasons. First, much of the survey data refers to the "average caseworker," yet the survey contains no information as to what the surveyed employers considered to be the "average" caseworker. That concept may very well differ from employer to employer.

Next, much of the data appears to reflect entry level or minimum wages for caseworkers. This is a major shortcoming because this is not an entry level job. Specifically, the employer's survey in no way reflects the wages paid to a social worker with the qualifications stated in the application. For example, in many cases where a survey response is specific, the employer provided a wage for a caseworker with a B.A. and 2 to 3 years experience. This particular job offer requires far more than a B.A. and 2-3 years experience...

These qualifications are not the qualifications of an entry level or "average caseworker," yet the employer would have us accept minimum or "average caseworker" wages as prevailing for this case. In fact, the employer's requirements are extensive and would be compensated at the high end of the wage scale, rather than at the low end. This is substantiated by your own survey.

Furthermore, the special requirements for the position were apparently so critical to you that you rejected over fifty U.S. workers for not meeting each and every one of them. These special requirements must be taken into consideration when calculating the prevailing wage.

(AF 14-16).

Upon review, we find several unresolved matters relating to the prevailing wage issue. First, as outlined above, the CO stated in the Final Determination: "There is no evidence in the case file which in any way corroborates your statement of February 21, 1995, that this office had 'already agreed that the methodology of the state survey is seriously flawed.'" (AF 14). Yet, in correspondence, dated December 20, 1993 (AF 83-85) and December 12, 1994 (AF 58), counsel for the Employer clearly challenged the validity of the State survey. Moreover, in a letter, dated December 15, 1994, Employer's counsel stated: "I understand that while your office agrees that the methodology relied on by the state in arriving at a prevailing wage in this case may be seriously flawed, there is still some additional information you would require in order to establish a new prevailing wage for a Bachelors Degree social work position such as this one (AF 57). Accordingly, there apparently is confusion between the CO and the Employer as to whether the CO acknowledged that the State survey was flawed."²

Secondly, it is well-settled that in cases such as this one, where an employer challenges the validity of a State survey, the CO has an obligation to explain the basis upon which the State wage survey relied, and assure that it is supported by reliable data. *See, e.g., Lisa Renstrom*, 93-INA-262 (June 28, 1994). In the present case, the record upon which the CO's denial was based contains little specificity regarding the methodology of the State survey. The State survey appears to be based simply upon the listing under the Occupational Wages 1993 Pennsylvania for the average annual salary of "Caseworker" in a Philadelphia Region 1, which includes Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties (AF 64-70).³

Thirdly, although the Employer's survey is far more extensive and provides greater detail than the State survey, we find it, too, is somewhat ambiguous and overly broad. Furthermore, we find some merit in the CO's contention that the Employer's survey includes many social

² On appeal, the Employer sought to explain this discrepancy and included an Affidavit by its counsel, Janet Parrish, in support of its statement regarding the alleged concession by the CO that the State survey was flawed (AF 3-4, note 1; AF 12).

³ Some data regarding the underlying basis for the State survey is contained in the Affidavit of Employer's counsel, which was submitted on appeal (AF 12).

workers with less experience than that which is being required for the job offered. In effect, the Employer is seeking to have it both ways by listing numerous requirements, rejecting more than 50 U.S. applicants for not meeting all of those requirements, and, then, basing its wage offer on a survey, which, in part, includes caseworkers of more limited experience.

In view of the confusion in the record regarding whether the CO acknowledged that the State survey was flawed, and the ambiguities in both the State and Employer surveys, we find that the case should be remanded. Carlos & Annie's, 93-INA-11 (Mar. 18, 1994).

On remand, the CO is directed to carefully analyze the job duties and stated job requirements. Since the CO apparently did not find the stated job requirements to be unduly restrictive, the CO is directed to conduct or obtain a new, more detailed survey of "training advocates" or "social group workers" or "caseworkers" in the area of intended employment, who have comparable skills and experience as that which are being required by the Employer for the job offered.⁴ The CO shall, then, notify the Employer of his new findings and allow the Employer an opportunity to either raise his wage offer and readvertise, if necessary, or contest the new wage survey.

ORDER

Accordingly, the denial of certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

⁴We reject the Employer's argument that the CO cannot take into account the other special requirements, rather than simply rely on the number of years of education and experience required (AF 7-8). Although it may result in a more limited survey, it would also provide a more accurate reflection of the true prevailing wage rate for the position offered. Moreover, we note, that the Employer's basic requirements of a B.A. degree plus three years of experience are greater than many of the caseworkers included in Employer's survey.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.